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APPLICABLE LAW AND GENERAL PRINCIPLES OF LAW

Working paper submitted by Canada

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I. INTRODUCTION

In April 1996, the first session of the Preparatory Committee on the Establishment of an International Criminal Court was held in New York. Various proposals were made by delegates regarding applicable law, general principles of criminal liability and defence, and the elaboration by the court of these general principles; see document, *General principles of criminal law*, A/AC.249/CRP.9, 4 April 1996 (hereinafter referred to as "General Principles (April)"). The *General Principles (April)* document does not attempt to reconcile the various proposals, but lists them for further discussion.

In an effort to advance this discussion, the present document sets out possible formulations of the principles of liability and defence. Within the context of a coherent framework of articles, the formulations are a construction, or re-compilation, of all of the proposed components of the principles as made by delegates in New York in April 1996. Where possible, components of the proposals in the *General Principles (April)* document are merged into one article or paragraph in the present document. However, no attempt is made to reconcile or to come to a compromise on the proposals where there are differences in substance. Rather, the different proposed components of the principles are set off from each other in square brackets. This should assist in the contrast and comparison of each proposed component. It should clarify where consensus already exists with respect to the components (or at least where no opposition has yet been expressed) and demonstrates the options where the proposals differ. Some words or phrases are set off in parentheses, which signifies options that are more in the nature of form than substance. Additionally, changes in grammar and form have been made to the various proposals in order to achieve a consistent style.

This exercise of construction or compilation was achieved for the following principles:

Nullum Crimen Sine Lege
Individual and State Responsibility
Criminal Responsibility of Principals
Physical Elements of Crime
Mental Elements of Crime
Responsibility of Other Persons in the Completed Crimes of Principals
Attempt
Conspiracy
Command Responsibility
Age of Responsibility
Insanity/Diminished Mental Capacity
Self-Defence and Defence of Others
Necessity
Duress/Coercion
Superior Orders

For the remaining principles, the various proposals put forward at the first session in New York were too different in substance to make a re-compilation of them a useful exercise. These remaining principles appear in this document as they did in the document *General Principles (April)*.

All the notes and questions that appear in *General Principles (April)* document appear in this document as well.

The structure of the present document reflects how the principles might appear if they were a part of the Statute. It is noted that no consensus was reached at the first session as to whether general principles should be included as a part [IV bis] of the draft statute or attached as an annex. For the purpose of promoting discussion, the present document has been drafted so as to provide a General Part within the Statute, although this can be easily changed.

Also, in April 1996 there was no consensus on the order in which the principles should appear.[1] The present document has been drafted in a manner that would hopefully avoid needless academic debate. The first grouping of principles sets out a number of general preliminary issues, such as the principle of legality and periods of limitation. Next follow a group of articles concerning the various modes and principles of criminal responsibility. Finally, all defences, exculpations, justifications and excuses are grouped together at the end, in order to avoid unnecessary debate as to the character of a defence (i.e., whether a defence should be classified as a justification as opposed to an excuse, etc.). However, the articles could be re-arranged if desired.

A first draft of this document was considered at an informal meeting held in Siracusa, Italy, in July 1996, which was attended by a number of representatives of Member State delegations that have participated in the Preparatory Committee In addition to the notes and questions contained in the *General Principles (April)* document, which are reproduced in the present document, this document also contains additional notes and questions that were raised at the July meeting which will be useful to assist the Preparatory Committee in examining the issues.

While prepared by the Department of Justice, Canada, any views or proposals expressed in this document do not necessarily represent the views of the government of Canada or its departments. This document was prepared for the purpose of aiding discussion of the various proposals that were put forth in New York in March-April 1996.

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[1] General principles of criminal law, A/AC.249/CRP.9, p. 1.

II. DRAFT ARTICLES AND EXPLANATORY NOTES

ARTICLE 33
APPLICABLE LAW

*[See the Annex to this document, which is reproduced from the paper on **General principles of criminal law** (pages 20-23), prepared at the first session of the Preparatory Committee on the Establishment of an International Criminal Court (A/AC.249/CRP.9, 4 April 1996). This annex discusses various options concerning applicable law and the elaboration by the court of general principles of criminal law.]*

GENERAL PRINCIPLES OF CRIMINAL LAW

ARTICLE 33-1
NULLUM CRIMEN SINE LEGE

1. [Provided that this Statute is applicable in accordance with article 21, 22 or 23] a person shall not be criminally responsible under this Statute:

(a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the conduct in question constituted a crime under international law [under the definition of the crimes of this Statute] [or by national law which is in accordance with international law] at the time that the conduct occurred and such conduct occurred after the entry into force of this Statute;

(b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

2. Paragraph 1 [1(a)], above, shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

3. If the law as it appeared at the commission of the crime is amended prior to the final judgment in the case, the most lenient law shall be applied.

Note:
The above approach might be compared to that adopted in the Statute of the Tribunal for the former Yugoslavia (article 2) and the Statute of the Rwanda Tribunal (article 1). Thought should be given to the possibility of concurrent temporal jurisdiction of the international criminal court and the ad hoc Tribunals.

A question was raised as to whether the term "international law" in paragraph 1(a)

needed to be clarified. Is it clear that the Statute's definition of a crime would be sufficient and exclusive for the purpose of establishing "a crime under international law" within the meaning of paragraph 1(a), and that for the purposes of determining whether conduct constitutes a crime for this article, no reference need or should be made to other sources of international law, such as other conventions or customary international law? If it is not clear, should the paragraph refer to crimes as defined by the Statute?

Is a reference in paragraph 1(a) to national law necessary if all crimes within the jurisdiction of the Court are defined by the Statute?

Should paragraph 1(b) also be qualified by the addition of the words "and such conduct occurred after the entry into force of this Statute", as in paragraph 1(a)?

ARTICLE 33-2
STATUTORY LIMITATION OF TIME

Text from A/AC.249/CRP.9

i) Proposal submitted by Japan (VII.1)

"1. The period of limitations shall be completed upon the lapse of xx years for the offence of .., and yy years for the offence of ...

"2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

"3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State which has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned."

ii) Siracusa draft (33-18)

"There is no statute of limitations for those crimes within the [inherent] jurisdiction of the [Tribunal]."

Note:
With regard to the Siracusa draft, some delegations observed that for any crimes which are not within the inherent jurisdiction of the court, the court itself should determine the statute of limitations. Some delegations observed that no statute of limitations should apply. Other delegations observed that it should.

Other Proposals:

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court;

but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, due to the lapse of time, a person would be denied a fair trial.[1]]

ARTICLE 33-3
INDIVIDUAL AND STATE RESPONSIBILITY

1. The Court shall have jurisdiction over [natural] persons pursuant to the provisions of this Statute.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

3. The official position of a person who commits a crime under this Statute, particularly whether the person acts as head of State or of government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.

4. Criminal responsibility for persons under this Statute shall not prejudice [affect] the responsibility of States under international law.

Note:
The question of the criminal liability of corporations or other legal persons may need to be considered.

ARTICLE 33-4
CRIMINAL RESPONSIBILITY OF PRINCIPALS

1. A person is criminally responsible as a principal and is liable for punishment for a crime under this Statute if the person, with the mental element required for the crime:

a) commits the conduct specified in the description (definition) of the crime;

b) causes the consequences, if any, specified in that description (definition); and

c) does so in the circumstances, if any, specified in that description (definition).

2. Where two or more persons jointly commit a crime under this Statute with a common intent to commit such crime, each person shall be criminally responsible and liable to be punished as a principal.

Note:
This article establishes the general principle regarding the liability of principal

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[1] *See A/AC.249/CRP.3/Add.1, 8 April 1996, p.2-3; this proposal is based on the plenary discussion at the first session of the Preparatory Committee and the Note to Siracusa draft, above.*

perpetrators of a crime. Further elaboration of the elements of this general principle, such as "mental element", "conduct" and causation, are elaborated in articles 33-5 and 33-6.

Other persons who participate in the commission of a crime under this Statute would be criminally responsible and liable for punishment in the manner provided in Articles 33-7, 33-8 and 33-9 [and 33-10] of this draft general part.

A question was raised whether this article is required, and whether it would be sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment? On the other hand, it was noted that specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for many of the other subsequent principles and avoids the need to elaborate defences within the Statute which merely constitute negations of the existence of essential mental or physical elements.

It was noted that the choice of using the word "description" or "definition" was dependant upon answering the question whether the definition of crimes would be solely within the Statute (in which case the term "definition" would be appropriate) or whether further elaboration of the elements of the definition of a crime in the Statute might be contained in an annex (in which case the term "description" might be appropriate given that this term could encompass both the statutory definition and the annexed elaboration of elements).

ARTICLE 33-5
PHYSICAL ELEMENTS OF CRIME

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime under this Statute can constitute either an act or an omission, or combination thereof.[2]

2. For the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission if:

a) the omission is specified in the description of the crime, and the person could have, but [intentionally or knowingly] failed to avoid the omission: or

b) in the circumstances

(i) the person is under a [pre-existing] legal obligation (duty) to avoid the consequences specified as an [constituent; material] element in the description of a crime;

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[2] *New proposal. This paragraph would link the concepts of act and omission with the concept of "conduct" to which reference is made in article 33-4, and would provide a conceptual link for paragraph 2 of article 33-5.*

[Alternative: (i) the person is under a [pre-existing] legal obligation (duty) to avoid the result of a crime;]

(ii) the consequence caused [result realized] by the omission corresponds to the consequence [result] that would be caused [realized] by a commission of such crime by means of an act; and

(iii) the person could have, but [intentionally or knowingly] failed to avoid the consequences [results] of such crime.

[3. A person is only criminally responsible under this Statute if the harm required for the commission of a crime is caused by and accountable to the principal's (perpetrator's) act or omission (conduct).]

Note:
The concept of "omission" presents particular problems to various legal systems.

The extent to which the concept of omission could raise the question of liability may be considered.

Delegations may wish to omit these two elements [i.e., omissions and causation] from the statute.

Regarding paragraphs 2 a) and b)(iii), it was questioned whether references to "intentionally or knowingly" were necessary in light of the subsequent article concerning mental elements, which requires proof of intent or knowledge as the general rule. On the other hand, it was noted that it should be made clear that a failure to avoid an omission due to negligence is insufficient for criminal liability, thereby, possibly justifying the retention of these words.

Regarding paragraph 2 b)(ii), a question was raised as to the origin of the legal obligation or duty to avoid the consequences or result of a crime. Does this obligation arise only by way of the Statute, or might the obligation arise by virtue of other sources of international or national law? Should it be clarified that any legal obligation must be an obligation pursuant to the Statute?

Also regarding paragraph 2 b), the draft proposals raise the question whether the obligation is to avoid the "consequences" specified in the definition of the crime or to avoid the "result" of a crime (which may be a broader concept and may include crimes of conduct that have no separate consequences)?

Regarding paragraph 3, it was questioned whether the draft should specify that the "act or omission" be voluntary. Others thought that this was not necessary, as voluntariness was addressed by the principles concerning mental elements in article 33-6.

A question was raised as to whether liability in respect of omissions should be limited only to specific crimes as defined by the Statute.

ARTICLE 33-6
MENTAL ELEMENTS OF CRIME

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent or knowledge [,whether general or specific or as the substantive crime in question may specify].

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

a) in relation to conduct, that person means to engage in the act or omission;

b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means:

a) to be aware that a circumstance exists or a consequence will occur; or

b) to be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists.

[4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

a) the person is aware of a risk that the circumstance exists or that the consequence will occur; and

b) the person is aware that the risk is highly unreasonable to take.]

Note:
The concepts of recklessness and *dolus eventualis* should be further considered in view of the seriousness of the crimes considered.

Therefore, paragraph 4 would provide a definition of "recklessness", to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly.

It was questioned whether further clarification might be required to the above definitions of the various types and levels of mental elements. It was noted that this could occur either in the General Part, in the provisions defining crimes or in an annex.

It was questioned whether it was necessary in paragraph 1 to make reference to

general and specific intent, as in either case the general rule would be that intent or knowledge is required.

Likewise, it was noted that any reference to "motive" should not be included; if relevant, motive or purpose would be an integral element of the definition of a crime.

ARTICLE 33-7
RESPONSIBILITY OF OTHER PERSONS IN THE COMPLETED CRIMES OF PRINCIPALS

[1. A person who [plans,] aids, abets or solicits the commission of a crime under this Statute is criminally responsible and liable for punishment in accordance with that person's own individual responsibility apart from the responsibility of other participants.[3]]

[2. A person who plans the commission of a crime under this Statute, which is committed by that person or another person, is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal].][4]

[3. A person may only be criminally responsible for planning the commission of a crime where so provided in this Statute.]

4. A person solicits the commission of a crime if, with the purpose of encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime, the person commands, [orders], requests, counsels or incites the other person to engage [or participate] in the commission of such crime, and the other person commits a crime [or is otherwise criminally responsible for such crime] as a result of such solicitation.

5. A person who solicits the commission of a crime is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal.]

6. A person aids or abets the commission of a crime if the person does anything for the purpose of facilitating the commission of such crime by another person.

7. A person who aids or abets the commission of a crime is criminally responsible and liable for punishment {shall be liable to [a reduced punishment][to the same punishment as

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[3] *General Principles (April) p. 4 & 5: Statute of the former Yugoslavia Tribunal, and Siracusa draft (March 1996). Note: references to "instigates" and "orders" have been deleted from those proposals as these concepts are now addressed by article 33-7, paragraph 4. References to "attempt" and "commits" have also been deleted as these are addressed by articles 33-3, 33-4 and 33-8.*

[4] *General Principles (April) p. 5: see Explanatory note from the Japanese delegation. See also "Conspiracy", article 33-9, Infra.*

provided in this Statute for a person who commits such crime as a principal]}.

Note:
The importance of being able to punish the planners was recognized. Under this article, planners are punishable only if a principal actually committed a crime as a result of such planning or soliciting.[5] An alternative way of addressing the situation of planners is through the concept of "conspiracy"; see Article 33-9 and notes relating to "conspiracy", below.

It was questioned whether paragraph 1 was redundant and should be deleted in light of the specific paragraphs that followed, which in greater detail describe the forms of participation, responsibility and liability for punishment.

A question was raised whether a person who solicits another person to commit a crime should be responsible and liable not only if the other person commits the crime that was solicited but also for any other crime that the other person committed which the solicitor foresaw (or reasonably could foresee) would be committed as a result of the solicitation.

A question raised by the draft proposals is whether a person should be liable as a solicitor only if the person solicits another to be a principal perpetrator or whether the person should also be liable for soliciting another person to participate in its commission as an aider and abettor, (i.e. "otherwise criminally responsible").

It was questioned whether the Statute (in a new and separate article?) should also criminalize and punish a person in the situation where that person solicits another person to commit or criminally participate in a crime, but the other person does not commit the crime.

It was also questioned whether the Statute (in a new and separate article?) should also criminalize and punish persons who aid and abet another person after the commission of a crime; (e.g., aiding a person to escape detection or arrest, or destroying or concealing evidence).

It was suggested that provisions concerning the quantum of sentence should not be included in the General Part, but be located elsewhere in the Statute.

ARTICLE 33-8
ATTEMPT

1. A person is criminally responsible and is liable for punishment for attempting to commit a crime if, with the intent to commit that crime, the person ...

[engages in conduct for the purpose of carrying out that intent which is more than mere

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5 *General Principles (April) p. 5: Explanatory Note from the Japanese delegation.*

preparation to commit the crime]

[engages in conduct constituting a substantial step towards the accomplishment of such crime]

[commences execution of the crime]

..., but fails to complete the commission of the crime due to [circumstances independent of that person's will] [or a fortuitous event], [or the object of the attempt is impossible to achieve].

[2. A person shall only be criminally responsible for attempting to commit a crime where so provided in this Statute.]

3. A person who is criminally responsible for attempting to commit a crime may be liable to [a reduced punishment].

[4. If the person abandons his or her efforts to commit the crime or otherwise prevents the accomplishment of the crime, the person is not punishable if the person completely and voluntarily has given up his or her criminal purpose before the crime was committed.]

Note:
With regard to the Siracusa draft [i.e., paragraph 4, above]: it was noted that some jurisdictions do not recognize "abandonment" as a defence. Questions were raised whether the concept of "abandonment" should be included in the definition of "attempt", or should be dealt with separately in the statute.

It was observed that an intervening event might break the chain of causation.

It was observed that the three alternatives in paragraph 1 were not mutually exclusive and could be combined as: "commences execution of the crime by engaging in conduct for the purpose of carrying out that intent, which is more than mere preparation and constitutes a substantial step towards the accomplishment of such crime".

It was questioned whether the three proposed reasons in paragraph 1 for the failure to complete the commission of a crime were mutually exclusive, or could be combined.

It was observed that the offence of attempt could apply generally to all crimes.

A question was raised as to when mitigation of punishment for an attempt was appropriate and whether such mitigation should only be for certain crimes.

[ARTICLE 33-9
CONSPIRACY]

[1. A person is criminally responsible and is liable for punishment for conspiracy if that

person [with the intent to commit a specific crime] agrees with one or more persons to perpetrate that crime [or that a common intention to commit a crime will be carried out] and an overt act is committed by that person [or by another party to the agreement] [for the purpose of furthering the agreement] [that manifests the intent].]

[2. A person is guilty of conspiracy even if the object of the conspiracy is impossible or is prevented by a fortuitous event.]

[3. A person shall only be criminally responsible for conspiracy in respect of a crime where so provided in this Statute.]

[4. A person who is criminally responsible for conspiracy is liable for the same punishment as the person who committed or would have committed the crime as a principal.][6]

Note:
See also article 6.1 of the Rwanda Statute.

It was noted that there were conceptual differences concerning conspiracy among the different legal systems.

The question was raised whether a "planner" should be punished when the crime was not completed, yet action had been taken to implement the plan.

Some delegations questioned whether this concept should be included in the General Part of the statute, although it might be necessary to punish such conduct in cases of exceptionally serious crimes. (See the explanatory note by the Japanese delegation)[7]. Others thought that it would be retrogressive not to include it since it was a form of liability at the Nürnberg trials.

It was questioned whether, in the situation where the crime agreed upon is actually committed, would the crime of conspiracy merge with the completed crime or remain a distinct and separate crime? If the conspiracy were merged with the completed crime, should a conspirator also be responsible for other foreseeable crimes that may have been committed in carrying out the conspiracy? (If the conspiracy remained a distinct crime, the conspirator would only be responsible (absent any other mode of participation) for a conspiracy to commit the crime that was agreed to be committed, as this is the subject matter of the unlawful agreement.)

Questions arising from the proposed drafts include: a) whether the accused conspirator must have an intent to commit the crime or whether it is sufficient that there is an intention that a crime be carried out and that others might be the actual committers; b) whether the accused conspirator must commit the overt act or whether it is sufficient if one of the other co-conspirators commits the overt act; c) what must be the nature of

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6 *New proposal to parallel other proposals concerning punishment.*

7 *General Principles (April) p. 5.*

the overt act (e.g., the act is undertaken for the purpose of furthering the agreement or must it actually manifest the agreement); d) whether a conspiracy exists even if the object of the conspiracy is factually impossible to achieve; e) whether conspiracy should be limited in respect of an agreement to commit certain listed crimes; and, f) the appropriate punishment for the crime.

ARTICLE 33-10
COMMAND RESPONSIBILITY

Alternative A. (Basis of Liability)

In addition to other (types of complicity)(modes of participation) in crimes under this Statute, a commander [a superior][8] is also criminally responsible (as an aider or abettor) for such crimes committed by forces under his or her command [by a subordinate][9] as a result of the commander's [the superior's] failure to exercise proper control where:

a) the commander [superior] either knew or, due to the widespread commission of the offences, should have known [had reason to know][10] that the forces were [subordinate was] committing or intending [about][11] to commit the offences [such acts][12], and

b) the commander [superior] failed to take all necessary [and reasonable][13] measures within the power of the commander [superior] to prevent or repress their commission [or to punish the perpetrators thereof].[14]

Alternative B. (No Immunity)

The fact that a crime under this Statute was committed by a subordinate [forces under the command of a commander] [as a result of the commander's failure to exercise proper control] does not relieve the superior [the commander] of criminal responsibility where the superior [commander] either knew or, [due to the widespread commission of the offences], had reason to know [should have known] that the subordinate was [forces were] committing or intending [about][15] to commit the offences [such acts] and the

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8 *General Principles (April) p.14: Statute of the former Yugoslavia Tribunal, article 7, paragraph 3.*

9 *Ibid.*

10 *Ibid.*

11 *General Principles (April) p. 14: Statute of the former Yugoslavia Tribunal, article 7, paragraph.*

12 *Ibid*

13 *Ibid.*

14 *General Principles (April) p. 14: Statute of the former Yugoslavia Tribunal, article 7, paragraph 3.*

15 *General Principles (April) p. 14: Statue of the former Yugoslavia Tribunal, article 7, paragraph 3.*

superior [commander] failed to take all necessary [and reasonable][16] measures [within the power of the superior [[commander][17]] to prevent [or repress] their commission [or to punish the perpetrators thereof].[18]

Note:
The major question raised by the two alternatives is whether command responsibility is a form of criminal responsibility in addition to other modes of participation and complicity, or whether it is a principle that commanders or superiors are not immune for the acts of their subordinates.

Another significant question raised is whether the principle of command responsibility should be restricted to military commanders or be extended to any superior in respect of the actions of subordinates.

What should be the level of knowledge or foresight required of a commander or superior with respect to the actions of subordinates, and what should be the subject of this knowledge?

What type of action, the failure of which leads to liability, should be required of the commander/superior (e.g. necessary or reasonable measures to prevent, repress or punish?)

ARTICLE 33-11
AGE OF RESPONSIBILITY

1. A person under the age of [twelve, fourteen, sixteen] at the time of the (alleged) commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].

2. A person who is between the age of [sixteen] and [twenty-one] at the time of the (alleged) commission of a crime shall be evaluated (by the Court) as to his or her maturity to determine whether the person is responsible under this Statute.

Note:
Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors.

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16 *Ibid.*

17 *General Principles (April) p. 14: Statue of the former Yugoslavia Tribunal, article 7, paragraph 3.*

18 *General Principles (April) p. 14: Statute of the former Yugoslavia Tribunal, article 7, paragraph 3.*

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 in respect of both of the age groups mentioned.

A question was raised as to what would be the criteria of the evaluation process, and should this be left for the Court to develop in supplementary rules or by jurisprudence?

It was questioned whether the Statute should specify that mitigation of sentence should or could be appropriate for those minors who were found to be mature enough to be criminally responsible.

ARTICLE 33-12
INSANITY/DIMINISHED MENTAL CAPACITY

1. A person is not criminally responsible [is legally insane] if at the time of that person's conduct which (would otherwise) constitutes a crime, the person suffers from a mental disease or mental defect that results in the person lacking substantial capacity either to appreciate the criminality [unlawfulness] of his or her conduct or to conform his or her conduct to the requirements of the law [, and such mental disease or mental defect caused the conduct constituting a crime.]"

2. Where a person does not lack substantial capacity of the nature and degree mentioned in paragraph 1, but such capacity is nevertheless substantially diminished at the time of the person's conduct, the sentence shall [may] be reduced."

Note:
The question was raised whether this defence should be included.

The question was also raised whether a provision was required to deal with the issue of whether the accused is fit to stand for trial. That provision might be included in the chapter on trial/procedural rules.

The question was raised as to what should happen to a person who is found insane. Should the person be released or be detained in a mental institution? If the latter, where? Should provision for this be made in the articles concerning enforcement of sentences by the Court and State Parties?

It was observed that this defence might be more relevant for some crimes (e.g., a war crime, such as killing of a prisoner of war) than for others (e.g., crimes involving the formulation of policy, such as genocide). If the defence is included, possibly it should be available only for some types of crimes?

ARTICLE 33-13
INTOXICATION

Text from A/AC.249/CRP.9:

i) Siracusa draft (33-4.2)

"2. A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct which would otherwise constitute a crime he is unable to formulate the mental element required by said crime. Such a defense shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime. With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defense."

Note:
The point was made that there were essentially two questions:
(a) whether intoxication should be available as a defence or as a negation of mens rea; and
(b) if available as a defence, should it be spelled out in the Statute or elaborated in another way. (See section B below.)

It was observed that this defence might be relevant for some individual crimes (e.g., a war crime, such as killing a prisoner of war). On the other hand it was observed that it might be better to leave this defence to be resolved by the Court through its jurisprudence rather than to include such a defence in the Statute.

It was also observed that intoxication is merely a factor relevant to the existence of, or which may negated, a required mental element. In light of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles 33-4 and 33-6), it was questioned whether such a defence need be explicitly mentioned as it is merely an example of one factor that could negate the existence of the required mental element.

Differences exist among national legal systems as to how intoxication is addressed, and other formulations of a defence could equally be suggested.

If the defence is available (either expressly by the Statute or by the Court's jurisprudence), should it be limited to only certain crimes?

Ability to stand for trial

This concerns insanity/old age/illness. It was noted that this type of defence should be dealt with under the procedural rules/chapter on trial.

ARTICLE 33-14
MISTAKE OF FACT OR LAW

Text from A/AC.249/CRP.9:

i) Proposal submitted by Japan (III.1)

"Mental element

"1. At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable.

"2. Even if a person, at the time of a conduct, does not realize its unlawfulness, he/she is criminally responsible in the case unless such error is unavoidable; provided that the sentence may be reduced."

ii) Proposal submitted by the Netherlands

"Mistake of fact or of law

"Invincible (Unavoidable) mistake of fact or of law shall be a defence provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment."

iii) Siracusa draft (33-15)

"1. A mistake of law or a mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful.

"2. The person who commits a crime in the mistaken belief that he is acting lawfully is not punishable, provided that he has done everything under the circumstances which could reasonably be demanded of him to inform himself about the applicable law. If he could have avoided his mistake of law, the punishment may be reduced."

Note:
Some delegations expressed doubts over including these concepts in the Statute.

Doubts were also expressed as to whether these concepts are negations of responsibility or a defence.

In light of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles 33-4 and 33-6), it was questioned whether this defence need be explicitly mentioned as it is merely one example of the various factors that could negate the existence of the required mental element.

It was questioned whether mistake of law should be permitted as a defence.

ARTICLE 33-15
SELF DEFENCE AND DEFENCE OF OTHERS

1. A person [is not criminally responsible and] is not liable for punishment if that person acts in self-defence or in defence of others.

2. A person acts in self-defence, or in defence of others, if the person acts [reasonably][and as necessary] [with the reasonable belief that force is necessary] to defend himself or herself, or another person, against a[n] [reasonable apprehension of] [imminent] [present] unlawful force or threatened unlawful force, [in a manner which is reasonably proportionate to the threat or use of force.]

[3. Self-defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of danger involved or the interest to be protected by the defensive act.]

[4. If a person exceeds the limits of the justifiable defence as described in paragraph 2, the sentence may be reduced.]

Note:
Several questions were raised: (a) whether a provision relating to defence of property should be included in the Statute; (b) whether self-defence should be used as a defence in response to a threat of unlawful force; (c) whether pre-emptive self-defence is valid; (d) whether self-defence should be limited to certain types of crimes under article 20; and (e) whether or not self-defence should be allowed in specific cases, at the discretion of judges.

Other questions raised by the draft include the extent to which the availability of the defence should be limited by requirements of reasonableness, necessity and/or proportionality.

The question also arises as to whether the defence should be available only if the defensive action is actually necessary or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the defensive action is necessary.

The degree of responsibility and punishment for excessive use of force in self defence also arises as an issue.

ARTICLE 33-16
NECESSITY

1. A person [is not criminally responsible and] is not liable for punishment if that person acts due to necessity.

2. A person acts due to necessity if:

a) [the person reasonably believes that] there is a threat of [imminent][present][or otherwise unavoidable] death or serious bodily harm to [or a threat to the freedom of] that person or another person;

[alternative: a) circumstances beyond a person's control are likely to create an unavoidable private or public harm];

b) [the person acts reasonably to avoid the threat] [there exists no other way to avoid the threat]; (and)

c) [the person acts only to avoid greater imminent harm] [the interests protected by such conduct exceeds the interest infringed by such conduct].

[3. This defence does not include the use of deadly force.]

[4. A person does not act due to necessity if [the circumstances are (within) not beyond a person's control] [(or if) that person knowingly and without reasonable excuse has exposed himself or herself to the circumstances creating the necessity].]

[5. If a person exceeds the limitation of the justifiable defence as described in paragraph 2 [this article], the sentence may be reduced.]

Note:
The question was raised as to the crimes to which the defence of necessity might apply.

The question was also raised whether the defence of necessity should include the use of deadly force.

It was questioned whether the defence of necessity should apply to the crimes of genocide and crimes against humanity.

Other questions arising from the proposed drafts include: a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable); b) the nature of the threatened harm to be avoided (e.g., serious bodily harm, death, freedom, or private or public harm); c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists; d) whether the accused need only act reasonably to avoid the threat if there is more than one equally harmful means of avoidance or must

there be no other way to avoid the threatened harm other than by the accused's acts; e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; and f) what factors (such as voluntary exposure to the risk or control of circumstances) should deny the availability of the defence, and whether these are mutually exclusive or could be conjunctive.

ARTICLE 33-17
DURESS/COERCION

1. A person [is not criminally responsible and] is not liable for punishment if the person acts under duress or coercion.

2. A person acts under duress or coercion if:

[a) [the person reasonably believes that] there is a threat of [imminent] [present][or otherwise unavoidable] [unlawful] force or use of such force against that person or another person];

[a) [the person reasonably believes that] there is a threat of [imminent] [present][or otherwise unavoidable] death or serious bodily harm to that person or another person];

b) [the person acts reasonably in response to that threat] [the threat could not reasonably have been resisted by an ordinary person]; and

[c) the coerced conduct does not produce a greater harm than the one likely to be suffered (sought to be avoided) and is not likely to produce death].

[3. A person does not act under duress or coercion if that person knowingly and without reasonable excuse has exposed himself or herself to that duress or coercion].

Note:
Questions arising from the proposed drafts include: a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable); b) the nature of the threatened harm to be avoided (e.g., force serious bodily harm, death,), and whether it need be unlawful; c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists; d) whether the accused need only act reasonably to avoid the threat or whether no reasonable person could have resisted the threat; e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; f) whether causing death is a permitted response to a threat; and, g) what factors (such as voluntary exposure to the risk) should deny the availability of the defence.

[**Lesser of evils**

This defence, components of which appear under other defence's, may not need to be included in the Statute.]

ARTICLE 33-18
SUPERIOR ORDERS

1. The fact that a person acted pursuant to an order of a government or of a superior, [whether military or political], shall not relieve the person of criminal responsibility[19] [if the order appears to be manifestly unlawful][and the person has no alternative but to obey, or has no other moral choice].

2. Where the person has acted pursuant to an order of a government or of a superior in the circumstances as described in paragraph (1), the sentence may be reduced having regard to the circumstances [this fact may be considered in mitigation of punishment if the court determines that justice so requires].[20]

Note:
Three questions were raised:

(a) Should those troops who obey what appears to them at the time to be a manifestly lawful order, be criminally responsible if it transpires that their commander was acting illegally in giving the order?

(b) Should those troops who receive an order which is not manifestly lawful but simply lawful, be criminally responsible if it transpires that their commander was acting illegally in giving the order, and if they should have made further inquiries before obeying the order?

(c) What rules of law govern the legality or otherwise of an order?

It was also suggested that the defence not apply to the crimes of genocide and crimes against humanity. Should the defence be limited to only some types of crimes?

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19 *General Principles (April) p. 18: Statute of the former Yugoslavia Tribunal, article 7, paragraph 4.*

20 *General Principles (April) p. 19: Statute of the former Yugoslavia Tribunal, article 7, paragraph 4.*

ARTICLE 33-19
DEFENCES UNDER PUBLIC INTERNATIONAL LAW

Text from A/AC.249/CRP.9:

It was suggested to include the "Hafner list" as is:

- Military necessity;
- Reprisals;
- Article 51 of the Charter of the United Nations (cf. justifications in the International Law Commission draft on State responsibility)

Siracusa draft (33-13.3)

"3. Military necessity may exclude punishment only as provided by the international law of armed conflict."

Note:
It was questioned whether defences under public international law should be included in the General Part of the Statute, since they to a large extent relate to inter-State relations; whether a savings clause could be included in reference to the rights and duties of States under the Charter of the United Nations and the functions and powers of the principal organs of the United Nations under the Charter; and which set of rules governing reprisals should apply.

It was noted that most justifications for the use of reprisals have been eliminated under international law and, therefore, it would be counterproductive to permit such a defence in the Statute.

If defences under Article 51 were applicable, it was questioned whether these should be limited to only certain types of crimes (e.g., aggression, war crimes).

Given the trend in humanitarian law, it was questioned whether any of these defences should be available.

ARTICLE 33-20
OTHER DEFENCES

Text from A/AC.249/CRP.9:

Exhaustive or enumerative list of defences?

i) Proposal submitted by the Netherlands

"Notwithstanding the foregoing articles on defences the Court shall have the competence to take into account other defences, recognized by the country in the

territory of which the alleged crime has been perpetrated or by the law of the country the nationality of which the accused had at the time of the perpetration [commission]."

ii) Siracusa draft (33-11)

"1. The Court shall determine the admissibility of reasons excluding punishment in light of the character of each crime.

"2. Defences include but should not be limited to those in Article 33-12 to 33-17[of the Siracusa draft]."

Note:
Different views were held as to whether the list of defences should be exhaustive or enumerative. This leads to the question under section B below.

It was noted that if the nature of a defence was really the negation of a mental element, there was no need to specify that defence in the Statute. Further, it could be applicable by means of the savings clause as proposed in this article.

III. ADDITIONAL NOTES TO PART B OF DOCUMENT A/AC.249/CRP.9 OF 4 APRIL 1996

At the informal meeting held in Siracusa, Italy, in July 1996, a number of additional comments and questions were raised, in addition to those appearing in part B of the 4 April 1996 document entitled "General principles of criminal law" (A/AC.249/CRP.9). For the benefit of the Preparatory Committee, these are summarized below:

It is important that the major principles of crime law be included in the General Part, which is to be created by Member States as part of the Statute or an annex.

It was recognized that not all the relevant general principles of criminal law could be included in the Statute.

It was noted that there would need to be some mechanism to enable the Court to supplement the principles contained in the General Part.

It was acknowledged that the Court should not have the power to amend the general principles contained in the Statute (or annex), nor amend any Rules made by Member States that might accompany the Statute.

Some participants were of the view that the Court should be given the power to make judicial Rules to supplement (but not to amend) the General Part created by the Statute (as long as these Rules were not contrary to nor inconsistent with the General Part created by Member States). The question was also raised whether Member States should be required to approve or ratify these Rules. [Note: Part B of the *General Principles (April)* document contains some proposals to permit the making of judicial Rules.]

Other participants were of the view that the Court should not have any power to make formal Rules to supplement the General Part that would be contained in or annexed to the Statute. The Court should only be able to supplement (but not to amend) the general principles of the General Part by way of the normal jurisprudential process of reasoning on a case by case basis. [Note: Part B of the *General Part (April)* document contains some proposals that would guide or restrict how the Court should undertake this process.]

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INTERNATIONAL COOPERATION AND JUDICIAL [MUTUAL] ASSISTANCE

Working paper submitted by South Africa and Lesotho

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I. INTRODUCTION

The following draft for part 7 of the statute, pertaining to international cooperation and judicial assistance, has been prepared as a working paper for the August meeting of the Preparatory Committee on the Establishment of an International Criminal Court. The contents of the draft do not necessarily reflect the views of the Governments of South Africa and Lesotho. The purpose of the draft is to assist discussions at the August meeting on cooperation between the court and national jurisdictions.

This draft is based on part 7 of the International Law Commission's draft statute and the corresponding provisions of the updated Siracusa draft statute. Furthermore proposals made, and specific drafts submitted, by delegations during the first session of the Preparatory Committee have been incorporated into the document. Apart from references to the ILC and Siracusa draft statutes in footnotes and recognition that the proposal for articles 28 and 29 have been made by Canada, no other contributions have been attributed to specific delegations. The delegations of South Africa and Lesotho have also had the benefit of other delegations in the preparation of this document.

All additions to the text of the ILC draft statute appear in italics. In regard to certain provisions alternative wordings are indicated. Where the wording of provisions still requires particular consideration, such wording has been inserted in square brackets.

II. DRAFT ARTICLES AND EXPLANATORY NOTES

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL[MUTUAL][1] ASSISTANCE

ARTICLE __

OBLIGATION TO COOPERATE AND GENERAL PROVISIONS[2]

1. *States parties shall, in accordance with the provisions of this Part, cooperate with the Court in its investigation and prosecution of crimes under this Statute. A State shall not deny a request for cooperation except as specifically provided in this Part.*

2. *[Requests for cooperation may be made by the Court, [or Prosecutor] and shall be transmitted through diplomatic channels, unless the Court and the requested State agree on another mode for transmitting the requests.]*[3]

3. *Where non-cooperation by States with requests by the Court [or Prosecutor] prevents the Court from performing its duties in terms of this Statute, the Court may request the Security Council to take the measures necessary to enable the Court to exercise its jurisdiction, in relation to both States Parties to this Statute, or States not parties.*

4. *The Court may call on any State not party to this Statute to provide assistance* [4] *provided for in this Part on the basis of comity, an ad hoc arrangement, or through entry into agreement with such State.*[5]

5. *[Requests for cooperation shall be in an official language of the Requested State unless otherwise agreed.]*

6. *States Party to this Statute shall inform the Registrar of any conditions under their*

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[1]Not all assistance is provided by judicial authorities. "Mutual assistance", which is developing into a term of art, may be a better option and has throughout the text been inserted in square brackets after "judicial".

[2]This provision reflects the need for a general statement of the obligation of States to cooperate with the Court, and related matters.

[3]An alternative would be to provide that "Communications relating to a request under this Part shall be between the Registrar, or Prosecutor acting under Article 26, and the national authority designated by each State party for this purpose."

[4]See Syracusa draft art 56. This preferrable to Art 56 of the ILC draft which formulates the same principle in the form of an entitlement to States which are not a party to the Statute. It appears more correct to formulate the principle as empowering the Court to request cooperation, leaving the reaction of the requested State open.

[5]This could form the substance of a separate article. It should also be considered whether a provision should be added providing that the Court shall have the power to respond to any counter-request by such a State that has been requested to cooperate.

laws that requests for cooperation and judicial[mutual] assistance are required to comply with, and of any amendments to such laws.

ARTICLE 51

COOPERATION AND JUDICIAL[MUTUAL] ASSISTANCE[6]

1. *[States Parties shall afford to the Court the widest possible measures of judicial[mutual] assistance]* OR *[States have the obligation to provide assistance to the Court]*[7] in connection with any investigations and proceedings under this Statute.[8]

---

[6]The ILC draft Statute co-mingles provisions of mutual assistance on the one hand, and arrest and surrender on the other. In this text these two aspects have been separated into two distinct provisions, respectively articles 51 and 53. Each provision contains its own provisions relating to the obligation to cooperate and the grounds for denial of the request.

[7]The success of the Court depends on the effectiveness of the provisions pertaining to cooperation by States with requests for assistance. In this regard the imposition of a definite obligation on States to cooperate, as opposed to a more vague provision allowing a discretion on whether to cooperate, should be considered. The argument for the former option is that a rigid and absolute obligation, allowing for no discretion to States party which accept the jurisdiction of the Court, would be crucial to, and strengthen, the prinicple of complementarity. Consideration could be given to making the same rigid principles applicable to requests by States with preferent jurisdiction over a crime

[8]Another option is to couch this provision in reciprocal terms.

2. The Registrar, *or the Prosecutor [in the performance of his functions under Article 26]*[9], may with respect to a crime *under Article 20* transmit a request *in accordance with Article 57*[10] to any State *Party* for cooperation and judicial[mutual] assistance, *pertaining to*[11]:

a. the identification and whereabouts of persons *or the location of items*;

b. the taking of testimony and the production of evidence;

OR

the taking and production of [testimony or other] evidence and statements of persons[12];

c. the service of documents;

d. *the temporary transfer of persons in custody, with their consent, in order to provide testimony or other assistance to the Court;*

d.bis *assisting in the [making available/ transfer] of other persons not in custody, in order to provide testimony or other assistance to the Court*[13];

e. *the conduct of on site investigations and inspections*[14];

f *permitting the Court to sit on its territory for the purpose of taking of evidence or of conducting a proceeding before the Court;*

---

[9]See Article 26(2)(e) which empowers the Prosecutor to seek the assistance of States or the UN. Article 26 refers to pre-indictment requests. Requests by the Prosecutor after the indictment could also be provided for.

[10]See the note under article 52 in this document. If elements of article 57 of the ILC draft Statute are slotted in as article 52, bringing them into close proximity of these assistance provisions, this reference would change to "Article 52".

[11]Paragraph (j) is already a catch-all, obviating the need for "including, but not limited to"

[12]Other aspects that could be included in this provision are "including records of government" in regard to the production of evidence, and "whether or not under oath" with regard to statements.

[13]The problem of the arrest and forcible transfer of recalcitrant witnesses to the Court creates problems for many States. Provision could be made in the Rules of the Court for the Court to accept testimony recorded by the requested State in alternative ways, for instance by way of video recordings (see footnote 26 below). Another alternative would be to allow the Prosecutor/Court to take a deposition from such a witness within the territory of the requested State, provided of course that the defence would also be allowed to cross examine the witness if the Prosecutor takes the deposition.

[14]See ILC draft Statute article 26(2)(c). It has been observed that this is also a form of cooperation. This provision as drafted is conceivably wide enough to allow not only the Prosecutor to utilise it, but the Court as well.

g. executing searches and seizures[15]*;*

h. provision of originals and certified copies of relevant records and documents;

i. taking action as permitted by law to prevent injury to, or the intimidation of, a witness or the destruction of evidence[16]*;* or

j. any other assistance [not prohibited by the law of the requested State[17]*] which the Court may require*[18]*.*

3. *With regard to a request pertaining to a crime under*[19]:

(a) *Article 20 (a) to (d), all States Parties;*

(b) *Article 20 (e)*, States Parties which have accepted the jurisdiction of the Court with respect to the crime in question,

shall respond without undue delay to the request.

---

[15]This provision appeared as a provisional measure in article 52(1)(b) of the ILC draft Statute.

[16]These measures also appeared in the ILC draft Statute as provisional measures.

[17]If inserted here, this qualification may only apply to paragraph (j), and not all the forms of assistance provided for in this article. The aim is, however, to allay concerns States may have regarding the open-endedness of the provision.

[18]Despite the open-endedness created by this paragraph, it should be considered whether there are any other forms of assistance that need to be specifically provided for.

[19]The final wording of this provision, as well as that of the whole article, depends on which crimes are ultimately included under the jurisdiction of the Court. This drafting reflects a situation where the core crimes are under the inherent jurisdiction of the Court. If treaty crimes are excluded initially and a provision is inserted for the revision of the list of crimes, then a proviso could be considered along with such revision provision, providing for the cooperation by a requested State that has accepted the expanded jurisdiction of the Court with regard to the crime in question.

4. *[A State Party[20]] may, within 28 days of receiving a request under paragraph 2, file a written application with the Registrar [,or with the Prosecutor where the request is made by the Prosecutor during the investigation phase,] requesting that the Court set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 3, but shall take any provisional measure necessary to ensure that assistance can be given at a later moment.*[21]

OR

[States Parties and the Court shall give absolute priority to the request under paragraph 1 of this Article even over concurring requests from other States not having primary jurisdiction according to this Statute.[22]*]*

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[20]Does this refer to any State Party, or only a requested State Party?

[21]An expressed concern is that this provision could allow States to, in bad faith, block or delay compliance with requests for assistance. It has been pointed out that it is not in accordance with State practice for a State to challenge the decision of another State to request assistance. Does the provision therefore serve a useful purpose in the context of the ICC? Two views are that-(a) the provision opens up other grounds for denial of a request, in direct opposition to the intention that the grounds for refusal should be exhaustively ennumerated in the Statute; and (b) that the provision is necessary. It allows for a useful interplay between the Court and national jurisdictions in order to allow the latter to better (in view of the principle of complementarity) take an informed decision.

[22]If the first option is found to be undesirable in view of arguments reflected in footnote 20, this alternative, reflecting a reciprocal and rigid obligation approach, could be considered.

5. (a) *A requested State Party may deny a request for assistance, in whole or in part, if*[23]:

(i) *except for the crimes under Article 20(a) to (d), it has not accepted the jurisdiction of the Court with respect to the offence which is the subject of the investigation or prosecution; or*

(ii) *[the action requested is prohibited by the law of the requested State*[24]*]*

OR

[the authorities of requested State would be prohibited by its domestic laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State];

(iii) *execution of the request would seriously prejudice its security [,ordre public] or other of its essential interests*[25]

(iv) *[if the request would be manifestly ungrounded]; or*

(v) *[if the request is not made in conformity with the provisions of this Article.]*

---

[23]The PrepCom generally felt that the grounds on which the request may be refused should be limited in nature and should be specifically spelt out in the Statute. In this regard *ne bis in idem* could also be considered for inclusion, as well as manifest errors of fact or law by the court, and a statute of limitations if such a provision is included.

[24]This provision should not allow proliferation of grounds for refusal of a request on the basis of national law. The grounds for denial should remain limited to only those contained in this Statute. This provision is intended to cover the situation where, for instance, telephone tapping is requested and the law of the requested State does not allow such action. Consideration could also be given to formulating the provision in positive terms, for instance that " compliance with a request for assistance shall be in accordance with the national law of the requested State".

[25]The inherent danger of this provision is that it is possible to interpret it so broadly as to be ultimately counterproductive to the obligation to provide assistance. In this regard a proposal has been made to, where a witness refuses to give evidence on the basis of not wishing to disclose government secrets, provide for the Court to approach the State concerned to confirm the status of the information. The Court would then have to abide by the classification of that State.

(b) [Except where the Court has determined that a case is admissible under section 35, the requested State may postpone or refuse assistance where, in its opinion, execution of the request would interfere with an ongoing investigation or prosecution of the same matter in the requested State or in another State [or with a completed investigation or prosecution of that matter that might have led to an acquittal]]

OR

[A State may deny a request for assistance, in whole or in part, if:

(i) execution would interfere with an ongoing criminal investigation or proceeding in that State; or

(ii) execution would conflict with an obligation to provide assistance to another State in its investigation or prosecution.

(b.bis) Assistance may not be denied on the basis of paragraph (b)(i) or (b)(ii) if the Court has already declared the case giving rise to the request for assistance to be adminssible, and

(i) in a case under paragraph (b)(i), its decision took into consideration the investigation or proceedings pending in the Requested State; or

(ii) in a case under paragraph (b)(ii), the other State is a State party, and the Court's decision took into consideration the investigation or proceedings in the other State.]

(c) Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner[26]: Provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.

(d) If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for the denial.

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[26] In this regard it is conceivable that testimony could, for instance, be recorded electronically and made available to the Court in that format. It should be considered whether it is necessary to include a specific provision to the effect that the Court will be allowed to receive and consider such testimony. See footnote 13 above.

6. *The Court shall ensure the confidentiality of evidence and information except as required for the investigation and proceedings described in the request.*

7. If requested, the Court shall *reciprocally cooperate with and*[27] provide assistance to a State Party conducting an investigation *into actions which constitute a crime under* this Statute.

Note: A provision setting a time-threshold for cooperation could be considered.

ARTICLE 52: PROVISIONAL MEASURES

NOTE: In view of the proposal at the first session of the Preparatory Committee that provisional arrest be included under the provisions of Articles 28 and 29 (as pre-indictment arrest and post-indictment arrest) this provision as contained in the ILC draft Statute could be deleted[28]. The provisonal measures pertaining to protection of evidence and witnesses can be seen as assistance measures and have been inserted under article 51(2).

If this is done, the current ILC draft Statute's article 57 pertaining to the form and contents of the request could be inserted here as article 52, bringing it in closer proximity to article 51 which it applies to.

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[27]Some support exists for providing a reciprocal obligation on the Court to also provide assistance to States.

[28]It is, however, pointed out that other provisional measures, such as for instance deprivation of freedom through the seizure of passports, may indeed exist that may warrant the retention of this provision if these measures cannot be read in under the catch all provision of article 51(2)(i).

ARTICLE 53

SURRENDER[29] OF *ACCUSED OR CONVICTED PERSONS*[30] TO THE COURT

1. The Registrar shall transmit to any State on the territory of which the accused *or convictd person* may be found the warrant for the arrest and transfer[surrender] of *such person* issued under Article 28, *or in order to enforce the sentence of the convicted person,* and shall request the cooperation of that State in the arrest and *surrender* of *such person.*[31]

2. *A requested State Party on whose territory the accused or convicted person is found*[32] *shall, subject to paragraphs 8 and 9, take immediate steps to arrest and surrender a convicted person to the authorities identified in the warrant of arrest in the case of a convicted person*[33]*, or arrest and surrender an accused to the Court if the case is covered by:*

   (a) Articles 20 (a) to (d) [(a) or Article 23(1)][34]*; or*

   (b) if the requested State has accepted the jurisdiction of the Court with respect to the crime in question.

3. *The requested State Party, if it is a party to the treaty covered by Article 20(e) and has accepted the jurisdiction of the Court, shall give priority to surrender the accused to the Court over requests for extradition from other States.*

   OR

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[29]This article will require especial consideration of the principle of complementarity, and specific drafting to reinforce the principle may be necesary.

[30]It is conceivable that convicted persons may be at large for some reason. It may therefor be necessary to provide for the arrest of such convicted persons. Although this aspect is dealt with under this article, it has been pointed out that it may be more appropriate to deal with this aspect under article 59 (Enforcement of Sentences).

[31]See Art 53(4) of both the ILC and Siracusa drafts.

[32]Apart from stating the obvious fact that, due to the request in all probabilty being transmitted to more than one State, the State on whose territory the person is found should arrest and surrender that person, the text basically accords to art 53(2) of the Siracusa draft. See, however, art 53(2) of the ILC draft.

[33]It is conceivable that a covicted fugitive should be surrendered to the authorities of the State which has been designated as the administering State, and that the warrant would provide for this.

[34]The first option would apply if the ICC was given inherent jurisdiction over the core crimes.

[3. *If the Requested State also receives a request from a state for the extradition of hte same person, either for the same offence or for a different offence for which the Court is seeking the person's surrender, the appropriate authority of the Requested State shall determine whether to surrender the person to the Court or to extradite the person to the state. In making its decision the Requested State shall consider all relevant factors, including but not limited to-*

(a) whether the extradition request was made pursuant to a treaty;

(b) if the offences are different, the nature and gravity of the offences;

(c) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence;

(d) the possibility of subsequent surrender or extradition between the Court and the State requesting extradition; and

(e) the chronological order in which the requests were received.

3 bis The Requested State may not, however, deny a request for the surrender made under this Article in deference to another State's request for extradition of the same person for the same offence, if the state requesting extradition is a State party, and the Court has ruled the case before it admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.]

4. In the case of a crime to which Article 20(e) applies, the requested State Party, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime shall, where it decides not to surrender the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution.[35]

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[35] See Siracusa art 53(4) and ILC art 53(2)(b).

5. In any other case, the requested State Party shall [consider whether it can][36], in accordance with its legal procedures, take steps to arrest and surrender the accused to the Court, or [whether it should] take steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution.[37]

5.bis A requested State Party may not deny a request for surrender on the grounds that-

i. the person sought is a national of the requested State;

ii. the offence for which the person is being sought is a political or military offence[or an offence connected to such offences][38]*; or*

6. The surrender of an accused to the Court constitutes, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or the case be referred to the competent authorities of the requested State for the purpose of prosecution.

7. A State Party which *has accepted* the jurisdiction of the Court with respect to the crime *in question* shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.[39]

8. *The requested*[40] *State Party may delay complying with a request under paragraph 2 to 4 if the accused or convicted person is in its custody or control and is being*

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[36]Should there be a discretion in this regard? If not, then both the phrases in square brackets in this provision could be deleted.

[37]See ILC draft art 53(2)(c) and Siracusa 53(5).

[38]The separation of provisions dealing with mutual assistance and with arrest and transfer necessitates the insertion in this article of a provision dealing with the grounds on which the request for arrest and surrender may be refused.

[39]See Siracusa draft art 53(7) and ILC draft art 53(4).

[40] Siracusa draft art 53(8). If "requested" is retained here, it should also be inserted at the beginning of the next paragraph for the sake of uniformity. It would, however appear to be redundant due to the specific reference to "request" in both provisions and could therefore be deleted.

proceeded against for a serious crime, or serving a sentence imposed by [a/the][41] Court for a crime. It shall within [28 days] of receiving the request inform the Registrar of the reasons for the delay. In such case it

(a) may agree to the temporary surrender of the accused for the purpose of standing trial under this Statute; or

(b) shall comply with the request under paragraphs 2 to 4 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.[42]

9. A [*requested*] State Party may, within [*28 days*] of receiving a request under paragraph 1, file a written *request* with the Registrar requesting the Court to set aside the request on specified grounds *including those mentioned in Articles 35 and 42.* Pending a decision of the Court on the application, the State concerned may delay complying with paragraphs 2 *to 4* but shall take any provisional measures necessary to ensure that the accused *or convicted person* remains in its custody or control.[43]

10. *To the extent permitted under the law of the requested State and subject to the rights of third parties, all property found in the requested State that has been acquired as a result of the alleged offence or that may be required as evidence shall, upon request, be transmitted to the Court if surrender is granted, even if the surrender cannot be carried out, on conditions to be determined by the Court.*[44]

11[45]. *(a) A State party shall authorize transportation through its territory of a person being surrendered to the Court by another state. A request by the Court for transit shall be transmitted through diplomatic channels, unless otherwise agreed. The request for transit shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.*

(b) No authorisation is required where air transportation is used and no landing is scheduled on the territory of the State of transit. If an unscheduled landing

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[41] Art 53(8) of the Siracusa draft contains an error here. Either "a" or "the" depending on whether any court, or specifically the ICC is being referred to.

[42] See Siracusa draft art 53(8).

[43] See ILC draft art 53(6) and Siracusa draft article 53(9).

[44] Siracusa draft art 53(10).

[45] The need for a transit provision has been identified.

occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The state of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

ARTICLE 54

OBLIGATION TO EXTRADITE OR PROSECUTE

NOTE: Due to the insertion of article 53(4), the need for article 54 of the ILC draft Statute falls away. The provisions of the proposed article 54 (Judicial Assistance) of the Siracusa draft have been absorbed into article 51 and therefore do not require incorporation as a separate article.

ARTICLE 55

RULE OF SPECIALITY

1. A person surrendered to the Court under Article 53 shall not be proceeded against, sentenced or detained for any crime other than that for which the person has been surrendered.[46]

2. A State providing evidence under this Part may require that the evidence not be used for any purpose other than that for which it was provided unless this is necessary to preserve a right of the accused under Article 41(2).[47]

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. In a case of paragraph 1, the request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence.[48]

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[46]See art 55(1) of both the ILC draft and the Siracusa draft. This wording is based on the more comprehensive formulation of the Siracusa draft.

[47]The Prepcom expressed general satisfaction with the limited rule contained in art 55(2) of the ILC draft. The proposed wording reflects the wording of art 55(2) of the Siracusa draft.

[48]Siracusa draft art 55(3). The Prepcom emphasised that the exception to the rule should be based on the express consent or waiver given by the State involved.

ARTICLE 56

COOPERATION WITH STATES NOT PARTIES TO THIS STATUTE

NOTE: This provision has been inserted as subparagraph 4 of the proposed first article of this Part, obviating the need for its inclusion as a separate article.

ARTICLE 57

FORM AND CONTENTS OF THE REQUEST[49]

1. Requests under this Part shall:[50]

(a) be made by letter, fax, e-mail or any medium capable of delivering a written record[, provided that a request shall be confirmed through the diplomatic channel];

(b) *contain* the following, as applicable:

(i) a brief statement of the purpose of the request and the assistance sought including the legal basis [and grounds] for the request;

(ii) information regarding the person who is the subject of the request in sufficient detail to enable identification;[51]

(iii) a brief description of the [essential] facts underlying the request;

(iv) information concerning the complaint or charge to which the request relates and of the basis of the Court's jurisdiction;

(v) in a case covered by Article 28, a written warrant for the provisional

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[49]The deletion of article 52 has been proposed so that the matters previously dealt with as "provisional measures" may be dealt with in articles 28 and 29 as pre-indictment and post indictment arrest. This article could then be slotted in as article 52. If this is done it may be necessary to let the provisions inserted as article 52 deal with the form and content for requests for mutual assistance. A separate provision would then need to be inserted after article 53 to deal with the form and content of a request for arrest and surrender of persons.

[50]Siracusa draft art 57(1), elaborates on ILC draft art 57(1) and (2). The Prepcom was generally satisfied with the ILC draft but indicated that art 57(3) and (4) could be refined more.

[51]At the Prepcom it was proposed that the "identity and location of witnesses" should also be included in this list. This provision appears to be wide enough to encompass witnesses as well.

arrest and surrender of the accused;

(vi) *in a request pertaining to a convicted person, a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and a description of the specific offence or offences for which the person has been convicted;* [52]*and*

(vii) *any other information relevant to the assistance being sought;*[53] and

(c) *where applicable and unless otherwise agreed, as soon as practicable be provided to a requested State in the form of a duly certified translation in the official language of that State.*[54]

2. *Communications relating to a request under this Part shall be between the Registrar, or Prosecutor acting under Article 26, and the national authority designated by each State Party for this purpose,*[55], and where appropriate may be made through the International Criminal Police Organisation.[56]

3. *Where the requested State Party considers the information provided insufficient to allow it to comply with the request it may seek, without delay, additional information.*[57]

4. *Provided that the request contains sufficient information to meet the requirements of the relevant law of the administering party, the latter shall execute the request as*

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[52]If the Statute provides for requests pertaining to convicted persons, then this provision could be considered. It could, however, also be argued that paragraph (vii) would be wide enough to cover this situation.

[53]This catch-all provision derives from a proposal during the Prepcom.

[54]To provide for such translations would conceivably facilitate the procedures to be followed in the requested State. The provision as drafted provides for later transmission of the translation. This could avoid delays in urgent situations where the immediate preparation in a specific language could take time.

[55]Siracusa draft art 57-1, with the added provision for requests by the prosecutor during the investigative phase. ILC draft art 57(1) refers only to"between the competent national authority and the Registrar". The Prepcom had some divergence of views on this aspect. The proposed wording is intended to be a compromise that could accomodate all views.

[56]ILC draft art 57(2), Siracusa draft art 57-1(2). This provision has, in this draft, been linked to the provision contained in paragraph 1 of both the ILC and Siracusa drafts.

[57]Siracusa draft art 57(2), which elaborates on ILC draft art 57(4).

expeditiously as possible and transmit the results to the requesting party[58].

PART 8. ENFORCEMENT

ARTICLE 58

GENERAL RULE

States Parties undertake to *abide by* the judgements of the Court[59] *and shall enforce the sentences of the Court in their territory.*[60]

ARTICLE 59[61]

ENFORCEMENT OF SENTENCES

1. [*All States Parties shall assist the Court in enforcing prison sentences by accepting*[62] *convicted persons and thus becoming the adminstering State. A sentence of imprisonment shall be served in a State designated by the Court from the list of available administering States. To that end, the Court shall provide the State so designated with a certified copy of the Court's judgement to be enforced. The State so designated shall promptly inform the Court whether it accepts the request.*

OR

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[58]This provision is drafted in reciprocal terms to allow for the Court to be subject to the same obligation if requested to assist a State.

[59]Siracusa draft art 58. "Abide by" appears preferrable to "recognize" which is contained in the ILC draft art 58. The latter conjures up images of special recognition procedures.

[60]At the Prepcom a view was expressed that art 58 should not only provide for "recognition" of judgements, but also for enforcement of sentences. It should be noted that this is merely a statement of a general rule. Further proposals at the Prepcom where for the inclusion in this article of "States Parties have to recognize the judgements of the court as judgements rendered by their national authorities", and to provide reciprocally that the Court shall recognise the judgements of courts of the State Parties.

[61]For the greatest part the structure and wording of Siracusa draft art 59 is utilised for this article (and the first alternative for subparagraphs 1), as it reflects most of the comments made at the Prepcom.

[62]"Accepting" creates the possibility that this provision does not create a binding obligation. Should an alternative word be considered?

A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State *where the Court has its official seat.*]

OR

1. [*States parties shall enforce the judgement of the Court on designation by the Registrar on [geographical] criteria formulated by Rules of the Court in accordance with the rule of burden sharing.*

2. *No designation to enforce shall be notified to the territorial state, or the state of active or passive nationality.*]

3. *The consent of the sentenced person is not required for the enforcement of a sentence.*

4. *A sentence of imprisonment shall be subject to the supervision of the Court and be enforced:*

   (a) as pronounced by the Court; and

   (b) in accordance with the applicable law of the administering State.

5. *The same applies mutatis mutandis to the enforcement of fines and confiscatory measures. The proceeds therefrom shall be handed over to the Court which will dispose thereof in accordance with the provisions of paragraph 4 of Article 47.*

6. *The Court alone shall have the right to decide on any application for review of the judgement. The administering State shall not impede the sentenced person from making any such application.*

7. ***A sentenced person in the custody of the administering State shall not be subjected to prosecution or punishment for any conduct committed prior to transfer unless such prosecution or punishment has been agreed to by the Court.***

ARTICLE 60

EARLY RELEASE[63]

1. *The administering State shall not release the prisoner before the expiry of the sentence as pronounced by the Court.*

2. *The Court alone shall have the right to decide on the release of a prisoner before the expiry of the sentence and determine the conditions and effects of the release. That decision shall be taken by a Chamber of five judges, who may in arriving at their decision take representations by the administering State or any other interested party into account.*[64]

3. *The prisoner may apply to the Court for a decision according to paragraph 2.*

4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to *early release* of the *administering State*. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.[65]

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[63]This wording is based on article 60 of the Siracusa draft which appears to be simpler than the system envisaged under art 60 of the ILC draft. It appears appropriate that the Court should be the authority to decide on matters of pardon, parole and commutation of sentences.

[64]The insertion of the last phrasewould make clear that representations may be made to the Court concerning the release of the prisoner. In ILC draft art 60(1) and (2) it was made especially clear that the early release conditions pertaining in the administering State could be taken into account in determining early release.

[65]ILC draft art 60(4).

TEXT PROPOSED BY CANADA FOR ARTICLES 28 AND 29 PURSUANT TO THE DELETION OF ILC DRAFT STATUTE ARTICLE 52

ARTICLE 28

ARREST

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant *for the arrest of a suspect before indictment* if:

   (a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

   (b) the suspect may not be available to stand trial unless *arrested before indictment.*

2. *(a) The Prosecutor shall transmit the warrant to the State where the suspect is located, along with a request for the arrest of the suspect and a statment of the reasons to believe that the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to file an indictment and make a request for indictment within [90 days]. The arrest request should be accompanied by a description of the person sought, together with all available information that will help to identify and locate the person. Where necessary under the law of the State where the suspect is located, the Prosecutor should also provide a brief summary of the facts of the case and the reasons why pre-indictment arrest is believed to be necessary.*

   (b) Where a suspect is arrested before the indictment and an indictment is subsequently filed against the suspect, the Prosecutor shall transmit a copy of the indictment to the State with custody of the accused, along with a request that the accused be surrendered to the Court for trial. The request should be followed by such other additional material as may be required by the law of the State with custody of the accused.

   (c) In the case where a suspect has been arrested before indictment, if before the expiry of [90 days], a decision is taken by the Prosecutor not to indict the suspect or the Presidency decides not to confirm the indictment, the Prosecutor shall immediately advise the custodial State of that fact.[66]

3. *In the case where no pre-indictment warrant has been obtained,* as soon as praciticable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a *warrant for the arrest of the accused* . The Presidency shall issue

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[66] A concern is that this provision may create constitutional problems for certain States for whom it wold be unacceptable that a person be in custody for a period and then not be indicted. A possible solution is to insert a provision that some form of assurance should be given that an indictment will follow the request for arrest.

such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

3.bis *The Prosecutor shall transmit the warrant to the State where the accused is located along with a request that the accused be arrested and surrendered to the Court for trial. The request should be accompanied by a description of the person sought, together with all available information that will help identify and locate the person. The request should be followed by such other additional material*[67] *as may be required by the law of the State where the accused is located.*

ARTICLE 29

PRE-TRIAL DETENTION OR RELEASE

1. *The State that has received a pre- or post-indictment warrant and a request for the arrest of a suspect shall immediately, in accordance with its law, take steps to arrest the suspect on the basis of the warrant of the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request.*

2. *A person arrested shall be brought promptly before a judicial officer in the custodial State who shall determine, in accordance with the law of that State, that the person has been arrested in accordance with the proper process and that the person's rights have been respected.*

3. A peron arrested may apply to the Presidency for a determination of the lawfulness under this Statute *of any arrest warrant or order of determination issued by the Court.* If the Presidency decides that the arrest or detention was unlawful *under the Statute,* it shall order the release of the accused, and may award compensation.

3.bis *A person arrested shall have the right to apply to a judicial officer in the custodial State for interim release pending the indictment or surrender of the person. The custodial State shall ensure that the views of the Prosecutor on interim release are brought to the attention of the judicial officer.*

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[67]Only information pertaining to elements of fact, and not of law is envisaged under this provision.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

4.bis *In the case of a person arrested before indictment, if no indictment is received within [90 days] of that person's arrest or the Prosecutor advises the custodial State that no indictment will be filed, the person shall be released from custody or any terms of interim release. The release of the person shall not preclude that person's re-arrest should an indictment and a warrant be submitted at a later date.*

5.bis *An accused surrendered to the Court may apply to the Presidency for interim release pending trial. The Presidency may release the accused with or without conditions if satisfied the person will appear for trial.*

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RULES OF PROCEDURE

Working paper submitted by Argentina

Note: This paper contains some preliminary comments and alternative proposals on the paper submitted by the delegations of Australia and the Netherlands (A/AC.249/L.2).

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Rule 9

(A) No member of the Presidency who has participated in a decision by the Presidency under articles X (A 26(3), 27(5), 28, 29, 30(3) ILC) of the Statute concerning the case being tried or under appeal may sit as a member of the Trial or Appeals Chamber in that case. No Judge who has made a decision under articles X (A 26(3), 27(5), 28, 29, 30(3) ILC) of the Statute concerning the case being tried or under appeal pursuant to a delegation from the Presidency under article X (A 8(5) ILC) of the Statute may sit as a member of the Trial or Appeals Chamber in that case.

(B) A member of the Presidency who participated in the confirmation of the indictment against a suspect under article X (A 27(2) ILC) of the Statute may not subsequently sit as a member of the Trial Chamber for the trial of that accused or as a member of the Appeals Chamber hearing an appeal in relation to that trial.

(E) If a Judge is disqualified from continuing to sit in a part-heard trial and thereby deprives the Trial Chamber of its required quorum under article X (A 45(1) ILC) of the Statute, he or she shall be replaced immediately by an alternate Judge if the Trial Chamber has from the start of the trial comprised more than the required number of Judges. Otherwise, the Presidency shall order a retrial.

[Note: The proposed reforms are based on a strict interpretation of the principle of impartiality; it is felt that a judge who has sat previously in the same case, even if he or she has not played a decisive role, runs the risk of being subjected to influences which may prevent him or her from making an impartial decision. Therefore, it is preferable to establish an explicit rule - in line with part of the jurisprudence of the European Court of Human Rights, in the cases of "Piersack v. Belgium" (1982) and "De Cubber v. Belgium" (1984) - prohibiting the subsequent participation of the judge in the decision on the case, thereby avoiding an interminable discussion of the potential effects of the specific action taken by the judge for the principle in question. A similar general rule should be added to article 8(5) of the draft Statute prepared by ILC. The amendment of subrule (E) is based on the so-called "principle of immediacy", according to which only those who have witnessed the trial proceedings in their entirety are in a position to pass judgement.]

Rules 10 to 13

For the cases of illness or other incapacity (Rule 10 (A)), death (Rule 11 (A)), loss of office (Rule 12 (A)) or resignation (Rule 13 (A)) of a member of the Trial Chamber, the following formula is proposed:

If a Judge sitting as a member of the Trial Chamber is unable to continue sitting in a part-heard trial owing to illness or other incapacity, the Presiding Judge may adjourn the proceedings, if the cause of that inability seems likely to be of short duration. Otherwise, or if the cause of the

inability is still present 10 days after the adjournment, the Presiding Judge shall report to the Presidency, which shall order a retrial. If the Trial Chamber has comprised more than the required number of Judges from the start of the trial, the Judge in question shall be replaced immediately by an alternate Judge. This rule shall also apply to cases of death, loss of office or resignation of a Judge from the Trial Chamber.

[Note: The basis for this amendment is the same as that for Rule 9 (E). Only a Judge who has been present without interruption throughout the trial is in a position to pass judgement in a case. Alternative measures, such as audio and video recordings, cannot substitute for the judge's direct sensory perception of what takes place in the courtroom, and therefore do not constitute justifiable exceptions to the principle in question. In appellate proceedings, on the other hand, the principle of immediacy is much more limited in scope, since, as a rule, the Appeals Chamber bases its decision on the trial record. Therefore, the rules applicable in case of the death, incapacity or other impediment of a member of the Appeals Chamber have not been amended.]

Rule 51

(C) No person who has witnessed the act with which the accused is charged shall be admitted as defence counsel, nor shall a defence counsel be allowed to participate or continue to participate in the proceedings if there is a strong likelihood, according to objective information, that:

1. He or she participated or is participating in any of the offences under examination in the proceedings;

2. He or she has committed the crime of abetting or concealing the commission of these offences;

3. He or she participates with the accused in an illicit association or other type of unlawful organization that has a connection with the offence under examination in the proceedings;

4. He or she participated or is participating in an escape attempt on the part of the accused.

[Note: Subrule (C) is intended to prevent situations where the criminal investigation is thwarted by connivance between the suspect and a counsel who is involved in the offence under examination in the proceedings; for example, through an agreement to destroy or hide evidence or to intimidate witnesses.]

Rule 52

(G) If a suspect or an accused is not indigent but does not wish to retain defence counsel, the Court shall none the less assign defence counsel from the list kept by the Registrar, and shall then seek to recover the cost of providing defence counsel according to the procedure laid down in subrule (H). If a suspect or an accused person elects to conduct his or her own defence, he or she

shall so notify the Registrar in writing at the first opportunity. However, if the Trial or Appeals Chamber considers that the technical defence is thereby impaired, it shall automatically order the assignment of defence counsel from the list kept by the Registrar, and may subsequently recover the cost of providing defence counsel if the suspect or the accused is not indigent.

(I) No defence counsel may represent more than one indicted person or accused in the same trial.

(J) If the defence counsel of a suspect or an accused resigns the defence or abandons it during the proceedings, the Trial or Appeals Chamber shall give the suspect or the accused a specific time period in which to retain other defence counsel. If, at the end of that time, the suspect or the accused has not retained counsel or stated his or her intention to defend himself or herself in person, defence counsel shall be assigned automatically from the list kept by the Registrar. Subrules (G) and (H) shall also apply in this case.

[Note: The amendments to subrule (G) and new subrules (I) and (J) are designed to ensure that the suspect or the accused has effective technical assistance. The general principle is that, in all cases, the suspect or the accused must have the support of expert defence counsel. The possibility of defence in person is limited to those cases where the suspect or the accused demonstrates that he or she is capable of defending himself or herself against the prosecution. This seems nearly indispensable in proceedings which, broadly speaking, are based on the general principles of the adversary system: a suspect or an accused without any kind of technical knowledge is unlikely to be evenly matched against a professional prosecutor.]

Rule 57 bis

Conduct of the questioning

Before commencement of the questioning, the suspect shall be informed in detail of the acts of which he is accused, along with all available background information relating to them, a summary of the content of the existing pieces of evidence and the applicable criminal laws. He or she shall also be informed of his or her right to remain silent without it being used against him or her.

Before questions are posed, the suspect shall be invited to make such statement as he or she deems appropriate on the matter under investigation, and to indicate any pieces of evidence that it would be advisable to obtain. In no case shall the suspect be required to undertake to tell the truth, or subjected to any type of coercion, threat or promise, except as expressly authorized under criminal or procedural law, nor shall he or she be obliged or induced by any means to speak against his will.

No method that compromises the freedom of decision of the suspect shall be employed during the questioning. The questions posed shall be clear and precise. If, in the course of the questioning, the suspect shows signs of fatigue or loss of composure, the questioning shall be adjourned until those indications are no longer present.

Breach of or failure to observe this rule shall render inadmissible the information and evidence obtained through the questioning, unless favourable to the suspect.

[Note: The proposed rule establishes a series of minimum principles to guarantee the rights of the suspect during questioning. Basically, it aims at ensuring that the statements by the suspect constitute, first and foremost, a means of defence, as stipulated in the majority of legal systems based on the European-Continental model. Accordingly, it regulates the prohibited methods of questioning and clearly establishes the suspect's ability to intervene and the duty to inform him or her, before beginning the questioning, of the acts of which he or she is accused and his right to remain silent.]

Rule 60

(A) If in the course of an investigation the Prosecutor is satisfied that there is a prima facie case that a suspect has committed a crime within the jurisdiction of the Court, he or she shall prepare in writing and forward to the Registrar under article X (A 27(1) ILC) an indictment for confirmation by the Indictment Chamber, together with supporting material.

(E) The Registrar shall forward the indictment and supporting material to the Indictment Chamber, which will inform the Prosecutor of the date fixed for review of the indictment.

[Note: Both the ILC draft Statute and the draft rules of procedure provide for the Presidency of the Court to be responsible for confirmation of indictments. Traditionally, in legislation based on the European-Continental model, this task belongs to a specific jurisdictional organ, which in the proposed rule is called the "Indictment Chamber", following the French term. It seems preferable that an organ separate from the Presidency, which has had no prior involvement in the case, should be responsible for determining the factual reliability and legal correctness of the indictment.]

Rule 61

(A) On reviewing the indictment, the Indictment Chamber shall hear the Prosecutor, who may present additional material in support of any count. The Indictment Chamber may also require the Prosecutor to present additional material in support of any count. The proceedings may be adjourned to allow additional material to be produced.

(B) Whether the accused was held by order of the Court, or, being at liberty, voluntarily submitted himself or herself to its jurisdiction, the Indictment Chamber shall notify the suspect of the date fixed for the examination of the indictment, and shall transmit to him or her a copy of the document submitted by the Prosecutor. On the day of the hearing, the Indictment Chamber shall hear the accused, who may raise objections against the indictment,

point out any defects it may contain, criticize the evidence supporting it and draw attention to any evidence relevant to a decision on the existence of a prima facie criminal case that was omitted by the Prosecutor. If this is the first submission by the accused, he or she may at the same time raise the other objections referred to in Rule 79 (A), or wait for the sixty-day period provided under paragraph (B) of that rule.

(C) The Indictment Chamber shall determine in relation to each count whether a prima facie case exists with respect to a crime within the Court's jurisdiction and dismiss those counts where such a case does not exist.

(D) [Paragraph (C) of the original retained without change]

(E) If a prima facie case is found to exist in relation to one or more counts in the indictment, the Indictment Chamber shall determine whether, having regard, inter alia, to the matters referred to in article X (A 35 ILC) of the Statute, the case should on the information available be heard by the Court.

(F) If the Indictment Chamber determines that the case should be heard by the Court, it shall confirm the indictment and request the Presidency to establish a Trial Chamber.

[Note: The proposed changes in rule 61 govern the general outline of the procedure for review of an indictment by the Indictment Chamber. The major innovation lies in granting the ability to intervene at this stage to an accused who has been detained or who has submitted himself or herself to the jurisdiction of the Court, giving him or her a preliminary opportunity to criticize and object to the Prosecutor's indictment. At the same time, the submission of those objections granted under Rule 79 is permitted, in accordance with article 34 of the draft statute.]

Rule 65

The Prosecutor may amend an indictment, without leave, at any time before it is confirmed in the review proceedings under article X (A 27 ILC) of the Statute, but thereafter only with leave of the Indictment Chamber, or, if at trial, with leave of the Trial Chamber. If leave to amend is granted, the amended indictment shall be transmitted to the accused and to his or her counsel, and where necessary the date for trial shall be postponed to ensure adequate time for the preparation of the defence.

The indictment may be amended when the Prosecutor wishes to introduce a new fact or circumstance that changes the legal category or the penalty for the act or acts in the indictment, or because of the disclosure of a new crime related to the act or acts contained in the indictment.

[Note: There are two changes to the original text. First, naturally, the organ responsible for giving leave to amend the indictment prior to confirmation: this duty is reserved for the Indictment Chamber. Next, minimum standards are established for amending an indictment, following the traditional pattern of European-Continental legal systems.]

Rule 74

(iii) [The Trial Chamber shall] call upon the accused, once all the counts have been read, to make any statement deemed appropriate concerning the indictment and the counts contained therein;

(iv) If the accused admits any or all of the acts contained in the indictment, order the judge to follow the summary procedure provided under Rule 145 and instruct the Registrar to set a date for a hearing;

(v) In other cases, after the suspect has been heard, instruct the Registrar to set a date for trial;

(vi) Instruct the Registrar to set other dates as appropriate.

[Note: The original version of this rule established the possibility that the accused could plead guilty to the facts in the indictment, which would have the effect of sending the proceedings directly to the sentencing phase under Rule 118. Thus, the Trial Chamber would have asked the accused, after the reading of each count, if he pleaded guilty or not guilty to the count. The "guilty plea", however, is not an institution that is accepted by legal systems based on the European-Continental model; for some countries, such a regulation could, in addition, be unacceptable by reason of limitations in their domestic law. An intermediate solution was sought through the "summary procedure" described in Rule 145, which is a well-known institution in the European-Continental sphere and which partially fulfils a function similar to the "guilty plea", basically by the savings in time and effort it represents. One important difference, at any rate, is that the accused is not ordered to plead guilty or not guilty to the counts in the indictment, but is called on to make any statement he or she considers appropriate after the indictment is read; only if, on this occasion, the accused admits that the facts described in the indictment are true can there be recourse to the summary procedure.]

Rule 75

[A second paragraph is added.] The questioning shall be governed by the provisions laid down in Rule 57 bis.

[Note: The guarantees and restrictions established in the new Rule 57 bis in favour of a suspect obviously apply also for the questioning of an accused.]

Rule 77

(A) Once detained, an accused may not be released except upon an order of the Trial Chamber.

(B) Release may be ordered by the Trial Chamber after hearing the host country and only if it is satisfied that the accused will appear for trial and,

if released, will not pose a danger to any victim, witness or other person, nor obstruct the investigation and trial by means of the destruction or concealment of evidence or by intimidation or threats against witnesses.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond or surety and the observance of such conditions as are necessary to ensure his or her presence for trial and the protection of others.

(D) When the Trial Chamber considers that the danger of escape or obstruction of the proceedings can reasonably be avoided by means other than imprisonment, it may impose one of the following measures:

(i) House arrest, in the home of the accused or in the custody of another person, under such surveillance as the Trial Chamber may provide;

(ii) The obligation to submit to the care or surveillance of a certain person or organization which will report periodically to the Court;

(iii) Forbidding the accused to leave the territory of the State in which he or she is located, or a geographical area determined by the Trial Chamber, without authorization.

The Trial Chamber may impose one or more of these measures as appropriate in the case, and may order such measures and communications as are required to ensure their fulfilment.

(E) Every three months, the Trial Chamber shall re-examine the reasons for which it ordered the detention of the accused and, as appropriate, order its continuation, its replacement by a different measure, or the unconditional release of the accused. Provisional detention of the accused before committal shall not extend beyond one year from the time at which it was pronounced. At the well-founded request of the Prosecutor, the Presidency may order its extension for an additional year, provided that the Prosecutor gives sufficient explanation of the necessity of the extension and can reasonably estimate the time required to bring the accused to trial.

(F) In no case shall the accused be kept in a place of imprisonment intended for the detention of convicted prisoners. He or she shall always be treated as innocent, and his or her conditions of detention shall respect his or her dignity and privacy. The provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners shall be observed.

(G) [The original paragraph (D) is retained unmodified.]

(H) An accused who is deprived of his or her liberty may request of the Trial Chamber his or her unconditional release or the replacement of detention by one of the measures listed in (D). He or she may also appeal a ruling against that request before the Appeals Chamber, in accordance with Rule 128.

[Note: The proposed modifications are based upon the need to add flexibility to an excessively strict regime of provisional detention, both in the draft Statute

(A 28 ILC) and in the original version of the Rules of Procedure, which appears to conflict with the principle of the exceptional nature of deprivation of liberty during the proceedings (article 9 (3) of the International Covenant of Civil and Political Rights). This is why we have essentially moved towards the adoption of alternatives to preventive detention, and the language of the original version of the rules has been somewhat toned down. In the same way, we have added a rule obliging the court which ordered the detention to periodically reconsider the reasons for it, as well as a time-limit rule. It has been considered appropriate to give the Trial Chamber the power to order detention while the accused is on trial, basically owing to the belief that the accused should be able to have recourse to another court (the Appeals Chamber) for an examination of the legitimacy of the measure. It would seem inconsistent with the draft Statute system if a decision of the Presidency could be reviewed by another organ of the Court.]

Rule 89 bis

(A) When an inspection, re-enactment or expert opinion is needed, the nature and characteristics of which are such that it cannot later be fully reproduced during the trial, or when testimony is to be given by a witness who, owing to some hindrance which cannot easily be overcome, is expected to be unable to testify during the trial, the Prosecutor shall ask the Presidency to appoint a judge to carry out or supervise that act.

(B) The judge shall carry out or supervise the act after summoning the Prosecutor, the accused, and his or her counsel, who shall be entitled to be present and shall have the same rights of intervention as during the trial. An accused who is in detention shall be represented by his or her counsel unless he or she expressly asks to intervene personally and provided that he or she is detained in the same place where the act is carried out.

(C) When the identity of the accused is not known or when one of the acts listed in (A) is of extreme urgency, the Prosecutor may make a verbal request to the Presidency to appoint the judge, who shall carry out or supervise the act without being required to summon the persons listed in (B), designating a defence counsel to observe the act or to take part in it.

[Note: The new rule refers to what in the systems of the continental European tradition are termed "definitive and unrepeatable acts". They are acts which, by their nature, cannot be fully reproduced during the trial, but are normally incorporated by the reading of a document which records the way in which they were carried out. The role of the juge d'instruction is partially introduced, restricted to the carrying out or supervision of the act in question, and the prosecution and the accused and his or her counsel are given rights of intervention and supervision identical to those which they have during the trial.]

Rule 91

(C) The trial shall continue to take place in public in so far as the reasons for which proceedings were held in closed session cease to exist..

[Note: The addition is intended to ensure the principle of public trial. When the exceptional situation which justified the closure of the proceedings to the public no longer exists, the trial must resume in the normal way, with the public being allowed access to the courtroom.]

Rule 95

[It is proposed that sections (a) and (b) of paragraph (B) (i) should be deleted, because of the danger that they may lead to an unacceptable restriction of the right of the accused to cross-examine and contradict witnesses.]

Rule 100

(C) The accused may give evidence in his or her own defence, if he or she so desires. If he or she does so, his or her testimony shall be governed by the provisions of Rules 57 bis and 75.

[Note: While in common law systems the rule is that the accused is not at any time invited to give evidence during the trial, and that if he decides to do so of his own free will he is treated like any other witness, in continental European systems the reverse applies: the accused is invited to give evidence, he may refrain from doing so and, should he wish to give evidence, he does so under the rules which govern his questioning during the pre-trial phase - that is, unlike witnesses, he is not required to promise to tell the truth. We have struck a balance between the two: the accused gives evidence only if he decides to do so spontaneously and voluntarily; if he does, all the restrictions and principles set out in Rules 57 bis and 75 apply.]

Rule 104

(B) The judgement shall include:

(i) Details of the court in which it was pronounced and the date; the first and last names of the accused and such other information as may serve to determine his personal identity;

(ii) An account of the events and circumstances which were the object of the initial accusation or its modification;

(iii) The votes cast by the judges, with a concise description of their basis in fact and in law;

(iv) The precise determination of the offence which the Appeals Chamber considers to have been proved;

(v) The substantive part, with an indication of the legal provisions applied;

(vi) The signature of the judges; however, if one of the members of the Trial Chamber has been prevented from signing the judgement subsequent to the deliberation and vote, that shall be indicated and the judgement shall be valid without the signature.

(C) The judgement may not go beyond the act and circumstances described in the indictment, or amended indictment, if any.

[Note: Both the draft Statute and the draft Rules of Procedure are premised on a system of professional judges and not jurors. Professional judges are generally required to state the de facto and de jure grounds on which their decisions are based (acquittal or conviction). The proposed new paragraph (B) establishes, precisely, the obligation of the members of the Trial Chamber to state the grounds for the judgement and, at the same time, it regulates the other requirements which the judgement should fulfil. Lastly, the principle of consistency between indictment and judgement is established: the court may not hand down a judgement on acts which have not been included in the indictment or an amendment thereto.]

Rule 106

(F) The spouse of a suspect, his or her ancestors or descendants, his or her close relatives - either blood relatives or relatives by adoption - or a person who lives with the accused and is bound to him or her by ties of affection may refuse to testify. Such persons shall be informed of their right to refuse to testify before each testimony begins. They may exercise that right even while they are testifying, including in response to specific questions.

(G) Persons who have a duty to keep an official or personal secret in connection with the subject of their testimony shall not be admitted as witnesses. If called upon to testify, they shall appear, explain the reason why they are required to keep the secret and refuse to testify.

(H) If the Trial Chamber finds that the witness has no grounds for invoking the right to refuse to testify or the need to keep a secret, it shall order him or her to testify.

[Note: Paragraphs (F), (G) and (H) combined establish limits on summoning witnesses. First, the spouse and close relatives of the accused are entitled to refuse to testify; the idea is to avoid placing those witnesses in the difficult position of having to decide between testifying against someone to whom they

have an emotional tie and committing the crime of giving false testimony. In turn, those paragraphs establish the obligation of the Trial Chamber not to admit testimony of persons required to keep a professional or personal secret.]

Rule 112

Evidence that has been obtained by methods which cast serious doubt on its reliability shall not be admitted. Evidence obtained in violation of the rules established in the Statute or any rules which the Court shall subsequently decide, or by methods that violate internationally protected human rights, shall also not be admitted.

[Note: The Rule seeks to establish in greater detail the scope of the rule of exclusion of illegally obtained evidence. If the procedure established in the Statute and in the Supplementary Rules decided by the Court is not respected, evidence obtained through irregular acts or in violation of internationally recognized human rights shall be inadmissible.]

Rule 113

[It is proposed that paragraph (b) (iv) should be deleted.]

[Note: From the perspective of the accused's right to a defence, it does not seem possible, as provided in the draft, to bar all information on the victim's previous sex life. It is not difficult to imagine the existence of cases in which the victim's previous sexual conduct is a relevant piece of information in the determination of the accused person's criminal liability, and it is therefore not clear how the accused can be denied the right to prove his innocence of the charges brought against him on the basis of that same information. If it is feared that this right will be used abusively or in a manner that is humiliating to the victim, this may be resolved by the Trial Chamber's power to exercise controls.]

Rule 142

(D) The Appeals Chamber may rule only on objections formulated by the parties in their appeals. When the decision has been appealed only by the accused, it cannot be amended to his or her detriment.

[Note: This addition is aimed at setting the limits within which the Appeals Chamber may decide on the case. First, the Chamber may not go into aspects of the appealed decision which have not been submitted for its consideration by the parties. The second limitation is self-evident: an appeal brought solely by the accused, in accordance with his or her right to obtain a revision of the judgement, may not expose him or her to more harmful consequences. The solution would be even clearer if the Prosecutor was denied the possibility of appealing an acquittal.]

Rule 144

[A second paragraph is added.] The conviction shall be reviewed when:

(i) Additional evidence has been discovered which was not available at the time the conviction was handed down or confirmed and which could have had a decisive influence on the judgement;

(ii) It is proved that conclusive evidence, considered in the judgement, has no probative value because it was false, invalid, tampered with or forged;

(iii) It is proved that one of the judges who participated in the judgement or in its confirmation committed, in the case in question, a serious breach of his duties;

(iv) A previous judgement in favour of conviction was annulled;

(v) A more lenient criminal law than that applied in the conviction should be applied retroactively.

[Note: The reasons for revision of the conviction are not developed in the draft Statute. The rules proposed herein reflect the classic cases which lead to a revision of judgement.]

PART XIII

SUMMARY PROCEDURE

Rule 145

In the case set forth in paragraph (iv) of Rule 74, the Trial Chamber shall adopt the following procedure:

(A) The Trial Chamber shall hear the indictment by the Prosecutor and the penalty he seeks. Immediately thereafter, it shall hear the accused. If the accused does not reaffirm his admission of the facts, or does not agree to the application of the summary procedure, the trial shall continue in accordance with the normal procedure and the admission by the accused shall be considered as not having been made. After it has heard the Prosecutor and the accused, the Trial Chamber shall hand down its decision unless it believes that evidence needs to be produced.

(B) The Trial Chamber may acquit or convict the accused, basing its judgement on the description of the act described in the indictment and admitted by the accused. In the case of a conviction, the penalty may not exceed that requested by the Prosecutor.

(C) If the Trial Chamber deems it appropriate to follow the normal procedure in order to obtain a better understanding of the facts or because a penalty more severe than that requested might be necessary, it shall order that the trial continue in accordance with that procedure.

(D) The accused may appeal the conviction.

[Note: This Rule establishes a summary procedure for cases where the accused admits to the acts described in the Prosecutor's indictment. The procedure provides for the possibility that the accused may retract his initial admission or, even if he does not, may not accept the summary procedure for his case. In turn, it gives the Trial Chamber the right to refuse to hold summary proceedings and to opt for the normal procedure for the case in question.]

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12-30 August 1996

TENTATIVE DRAFT ON PROCEDURE

Working paper submitted by Japan

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I. GENERAL PRINCIPLES

1. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, without due process of law.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty.

3. The accused, at all times, shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his/her own efforts, be assigned to his/her use by the Court. Matters concerning the qualification of counsel and the counsel assigned by the Court shall be provided in the Rules of the Court.

4. No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment, nor shall any person be compelled to testify against himself/herself or to confess guilt.

5. No person shall be held guilty by this Court unless the act in question constituted a crime under the definition of crimes of this Statute at the time the act occurred and such conduct occurred after the entry into force of this Statute. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by this Statute for the imposition of the lighter penalty, the offender shall benefit thereby.

II. INVESTIGATION AND PROSECUTION

1. If the Prosecutor concludes that there is a basis for a prosecution under this Statute, he/she shall, in accordance with the Rules of the Court, investigate the case, by seeking the cooperation of the States concerned or by himself/herself. The investigation shall be conducted in conformity with international law and with full respect for the sovereignty of the States concerned.

2. No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedure as are established by the Rules of the Court.

3. Any person is arrested or provisionally arrested shall be informed, at the time of arrest or provision arrest, of the reasons for his arrest or provisional arrest and shall be promptly informed of any charges against him/her in accordance with the Rules of the Court.

4. Any person arrested, provisionally arrested or detained on a criminal charge shall, in accordance with the Rules of the Court, be brought promptly before a judge or other officer authorized to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

5. Any person who is deprived of his/her liberty by arrest, provisional arrest or detention shall, in accordance with the Rules of the Court, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful.

6. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued, in accordance with the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedure as are established by the Rules of the Court.

7. If upon investigation the Prosecutor concludes that there is a prima facie case, he/she shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

III. TRIAL AND JUDGEMENT

1. The accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

2. Trials shall be conducted and judgement declared publicly. Where the Court unanimously determines publicity to be dangerous to public order, a trial may be conducted privately.

3. The accused is entitled to be informed promptly of the nature and cause of the charge against him/her and to have adequate time and facilities for the preparation of his/her defence and to communicate with counsel.

4. The trial shall not be held if the accused is not present. When the accused under detention has, when summoned on the date for trail refused to appear without good reason and made it particularly difficult to bring him/her to the Court, the Court may conduct the proceedings of trial on that date without the presence of the accused.

5. The accused is entitled to have the free assistance of an interpreter if he/she cannot understand or speak the language used in court.

6. The detailed regulations of procedure concerning trial and judgement including perjury shall be provide din the Rules of the Court.

7. No person shall be found guilty unless the Prosecutor proves beyond a reasonable doubt that the defendant has committed every element of the offence with which he/she is charged.

8. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed. In imposing sentence the Trial Chamber should take into account such

factors as the gravity of the crime and the individual circumstances of the convicted person.

IV. EVIDENCE

1. The accused shall be permitted full opportunity to examine all witnesses, and he/she shall have the right of compulsory process for obtaining witnesses on his/her behalf at public expense.

2. A document, audio recording, or video recording containing a statement of a person other than the accused, which was given before a judge of the court of a State party, is admissible in evidence when that person is not able to testify before the Court because of death, illness, injury, old age or other good cause.

3. Evidence obtained by means of a serious violation of this Statute or the International Covenant on Civil and Political Rights shall not be admitted in evidence.

4. Confession made under compulsion, torture or threat, or after prolonged arrest, provisional arrest or detention, or which is suspected not to have been made voluntarily, shall not be admitted in evidence.

5. No person shall be convicted or punished in all cases where the only proof against him/her is his/her own conviction.

V. APPEAL AND REVIEW

1. The convicted person and the Prosecutor may, in accordance with the Rules of the Court, appeal against his/her conviction and sentence on grounds of procedural error, error of fact or law, or disproportion between the crime and the sentence.

2. The convicted person and the Prosecutor may, in accordance with the Rules of the Court, apply to the court which rendered the original judgement for revision of the conviction on the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.

3. The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings provided by the preceding two paragraphs. Further rules that govern those proceedings shall be provided in the Rules of the Court.

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PROPOSALS ON THE ORGANIZATION OF THE COURT

Working paper submitted by Japan

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Article 9

Chambers

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of seven judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (b).

2. [as drafted by ILC]

3. [as drafted by ILC]

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and Pre-trial Chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules three such judges to be members of the Pre-trial Chamber for a given case. A Pre-trial Chamber shall include at least two judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a). A Pre-trial Chamber shall be responsible in the given case for such functions as prescribed in [articles 26 (3) and (5), 27 (2) to (4), 27 (5) (b), 28 (1) to (3), 30 (3), and any other functions concerning pre-trial process].

6. The Presidency shall nominate in accordance with the Rules five such judges who are not members of the Pre-trial Chamber for a given case to be members of the Trial Chamber for the same case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a).

7. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Pre-trial Chamber and Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

8. [as drafted by ILC as original para. 7]

Article 11

Excusing and disqualification of judges

1. [as drafted by ILC]

2. In the following cases a judge shall be excluded from the exercise of his functions under this Statute:

(a) If he himself is the injured party;

(b) If he is or was a relative of the accused or the injured party;

(c) If he is a national of a complainant State or of a State of which the accused is a national;

(d) If he is the legal representative, supervisor of the guardian or curator of the accused or the injured party;

(e) If he has acted as a witness or an expert witness in the case involving the accused or the injured party;

(f) If he has acted as the representative, counsel or assistant of the accused in the case involving that accused;

(g) If he has exercised the functions of a public prosecutor or a judicial officer in the case involving the accused;

(h) If he has previously exercised the functions of a judge in the case involving the accused at the national level; or

(i) If he has participated in the decision mentioned in article 8 or 37 (4), in the decision by the court below, in the original judgement of the case which has been sent back in accordance with the provisions of article 50 or in the investigations which form the basis of such decisions.

3. [as drafted by ILC]

4. [as drafted by ILC]

5. Procedures of the trial subsequent to the change of the judges in accordance with this article shall be prescribed by the Rules.

Article 12

The Procuracy

[1 to 4 and 7 - as drafted by ILC]

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint falling in the following cases:

(a) If they themselves are the injured party;

(b) If they are or were a relative of the accused or the injured party;

(c) If they are a national of a complainant State or of a State of which the accused is a national;

(d) If they are the legal representative, supervisor of the guardian or curator of the accused or the injured party;

(e) If they have acted as a witness or an expert witness in the case involving the accused or the injured party; or

(f) If they have acted as the representative, counsel or assistant of the accused in the case involving that accused.

6. In case the Prosecutor or a Deputy Prosecutor falls in the cases prescribed in the preceding paragraph, he may be challenged by the accused. The Presidency shall decide on challenges against the Prosecutor or a Deputy Prosecutor made before the first day of the public trial. Challenges made afterwards shall be decided by the Trial Chamber concerned.

Article 15

Discipline and loss of office

1. A judge, the Prosecutor or a Deputy Prosecutor shall not be removed against his will except by procedures in this article unless judicially declared mentally or physically incompetent to perform official duties.

2. A judge can be removed by a two-thirds majority of the States Parties upon request by either more than three judges or more than one tenth of the States Parties, if that judge falls in either of the following cases:

(a) If he/she has committed grave misconduct in performing his/her functions, or a serious breach of his/her official duties; or

(b) If he/she has been engaged in delinquency, whether officially or privately, which raises serious doubts in public confidence in his/her capacity as a judge.

3. A judge who has committed misconduct other than those mentioned in the preceding paragraph shall be subject to such disciplinary measures as decided by a two-thirds majority of the judges excluding himself/herself.

4. The Prosecutor or a Deputy Prosecutor can be removed by a majority of the States Parties upon request by either the Presidency or more than one tenth of the States Parties, if he/she falls in either of the following cases:

(a) If he/she has committed grave misconduct in performing his/her functions, or a serious breach of his/her official duties; or

(b) If he/she has been engaged in delinquency, whether officially or privately, which raises serious doubts in public confidence in his/her official capacity.

5. The Prosecutor or a Deputy Prosecutor who has committed misconduct other than those mentioned in the preceding paragraph shall be subject to such disciplinary measures as decided by _____.

6. Discipline including loss of office against other staff of the Court shall be governed by the Rules and the Staff Regulations.

7. [as drafted by ILC as original para. 3]

Article X

Compensation

1. The Court shall make compensation to those who were:

(a) Pronounced innocent by an irrevocable adjudication;

(b) Arrested or detained for the purpose of prosecution, although the prosecution against him did not eventually take place;

(c) Arrested or detained but the lawfulness of that arrest or detention was denied in accordance with this Statute; or

(d) Illegally inflicted losses upon by an officer of the Court intentionally or negligently in the course of performing its duties.

2. Procedures and criteria for compensation shall be provided in the Rules, including the expenses to be borne by a complainant State if that State lodged a complaint without sufficient reason.

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PREPARATORY COMMITTEE ON THE
ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL COURT
12-30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Yun YOSHIDA (Japan)

I. INTRODUCTION

1. The Preparatory Committee on the Establishment of an International Criminal Court met at United Nations Headquarters from 25 March to 12 April 1996 and from 12 to 30 August 1996, in accordance with General Assembly resolution 50/46 of 11 December 1995.

2. Under paragraph 2 of that resolution, the Preparatory Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. 1/

3. Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, opened the session, represented the Secretary-General and made an introductory statement.

4. The Codification Division of the Office of Legal Affairs acted as the secretariat of the Preparatory Committee, with Mr. Roy S. Lee, Director of the Division, acting as the Secretary of the Committee.

5. At the 1st meeting, on 25 March 1996, the Preparatory Committee elected its Bureau, as follows:

Chairman: Mr. Adriaan Bos (Netherlands)

Vice-Chairmen: Mr. Cherif Bassiouni (Egypt)
Mrs. Silvia A. Fernández de Gurmendi (Argentina)
Mr. Marek Madej (Poland)

Rapporteur: Mr. Jun Yoshida (Japan)

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6. Also at the 1st meeting, the Preparatory Committee adopted the following agenda (A/AC.249/L.1):

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Organization of work.

5. Further consideration of the major substantive and administrative issues arising out of the draft statute for an international criminal court prepared by the International Law Commission and, taking into account the different views expressed during the meetings, drafting of texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

6. Adoption of the report.

7. The Preparatory Committee had before it, in addition to the draft statute for an international criminal court adopted by the International Law Commission (ILC) at its forty-sixth session, 2/ the report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 3/ the comments received pursuant to paragraph 4 of General Assembly resolution 49/53 of 9 December 1994 on the establishment of an international criminal court (A/AC.244/1 and Add.1-4) and a preliminary report submitted by the Secretary-General pursuant to paragraph 5 of that resolution, on provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court (A/AC.244/L.2). Also before it was the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session; 4/ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; 5/ and Principles Guaranteeing the Rights and Interests of Victims in the Proceedings of the Proposed International Criminal Court. 6/

Notes

1/ The list of delegations to the Preparatory Committee is contained in document A/AC.249/INF/1.

2/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. II.B.I.5; and A/49/355, chap. II.

3/ Ibid., Fiftieth Session, Supplement No. 22 (A/50/22).

4/ A/CN.4/L.532 and Corr.1 and 3.

5/ General Assembly resolution 40/34, annex.

6/ E/CN.15/1996/16/Add.5, recommendation 2, annex.